

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

## EMPLOYEE PAINTERS' TRUST HEALTH & WELFARE PLAN, et al.,

**Plaintiffs,**

V.

DONNIE SHANE SHERMAN, et al.,

### Defendants.

C13-687 TSZ

## ORDER

THIS MATTER comes before the Court on plaintiffs' motion for reconsideration,

docket no. 40, of the Order entered April 2, 2014, docket no. 36. After reviewing the

motion, the Court directed plaintiffs to file a supplemental brief concerning two issues.

<sup>1</sup>namely (i) whether plaintiffs challenge the constitutionality of RCW 18.27.040(3),<sup>1</sup> and

namely (i) whether plaintiffs challenge the constitutionality of RCW 18.27.040(3),<sup>1</sup> and

(ii) whether plaintiffs have standing to raise such challenge. See Minute Order (docket

no. 41). Having carefully considered the arguments presented by plaintiffs, the Court

enters the following order.

<sup>1</sup> Plaintiffs indicate that they believe the Court can avoid addressing whether the Department of Labor and Industries (“L&I”) is constitutionally applying RCW 18.27.040(3), but they have nevertheless served notice of a constitutional question on the Washington State Attorney General pursuant to Federal Rule of Civil Procedure 5.1(a). See Supp. Br. at 3 (docket no. 43); Notice (docket no. 44). In light of the Court’s ruling on plaintiffs’ motion for reconsideration, as set forth in this order, the Court DECLINES to issue a certification pursuant to Rule 5.1(b) and 28 U.S.C. § 2403(b). See Fed. R. Civ. P. 5.1(c).

1     Discussion

2         Plaintiffs seek reconsideration of the Court’s ruling that they failed to properly  
3 serve defendants Wesco Insurance Company and American Contractors Indemnity  
4 Company (collectively, the “Sureties”) pursuant to RCW 18.27.040(3) and that, because  
5 the Court therefore lacks personal jurisdiction over the Sureties, the claims against them  
6 must be dismissed without prejudice under Rule 12(b)(5). The Court’s decision was  
7 based on Rules 4(e)(1) and 4(h)(1)(A), which together authorize service on a corporation  
8 in the manner set forth under state law, and RCW 18.27.040(3), which indicates that  
9 service of process in an action involving a contractor bond shall be exclusively by service  
10 upon L&I. Order at 2-4 & n.1 (docket no. 36). In their supplemental brief, plaintiffs  
11 confirm that, in this case, they never attempted to serve the Sureties using the method  
12 described in RCW 18.27.040(3). Plaintiffs contend that doing so would have been futile  
13 because, on one prior occasion involving an unrelated federal suit, L&I declined to accept  
14 service on the ground that the action was not pending in the “superior court of the county  
15 in which the work was done or of any county in which jurisdiction of the contractor may  
16 be had.” RCW 18.27.040(3).<sup>2</sup>

17         Absent citation to any authority, plaintiffs assert that they have standing to raise,  
18 in this litigation, a challenge to L&I’s refusal to accept service with respect to cases filed  
19 in federal court. Plaintiffs further argue that L&I’s interpretation of RCW 18.27.040(3),

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21         <sup>2</sup> Plaintiffs assert that an “L&I bureaucrat took the time to highlight in yellow” and return with the service  
22 documents the quoted language of RCW 18.27.040(3). James Decl. at ¶ 10 (docket no. 40-1). Plaintiffs  
23 apparently intended to provide a copy of the highlighted material, but they failed to attach “Exhibit 4” to  
the submitted declaration.

1 as requiring that a claim against a contractor bond be filed in state court, constitutes an  
2 unconstitutional preclusion of the supplemental jurisdiction of federal district courts.  
3 Plaintiffs reason that, because L&I's application of the venue or jurisdiction provision of  
4 RCW 18.27.040(3) is improper, the Court's analysis of the statutory language relating to  
5 service of process is also incorrect. Plaintiffs' contention lacks merit.

6 Plaintiffs have no standing to complain about L&I's practices. Having failed to  
7 even try to serve the Sureties in the manner set forth in RCW 18.27.040(3), plaintiffs  
8 cannot show either injury in fact or causation, both of which, in addition to redressability,  
9 are required to establish standing. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555,  
10 560-61 (1992). An injury in fact must be "an invasion of a legally protected interest" that  
11 is both (i) "concrete and particularized," and (ii) "actual or imminent, not 'conjectural' or  
12 'hypothetical.'" Id. at 560. A causal connection requires that the injury be "fairly . . .  
13 trace[able] to the challenged action." Id. (alteration in original). Having made no  
14 attempt to serve the Sureties pursuant to RCW 18.27.040(3), plaintiffs rely on nothing  
15 more than speculation concerning how L&I would have handled the matter, and they  
16 cannot establish a causal relationship between an action taken by L&I and the failure, in  
17 this case, to effect proper service on the Sureties.

18 L&I's previous return of service documents in an unrelated case is insufficient  
19 proof that endeavoring to comply with RCW 18.27.040(3) would have been futile; one  
20 occasion does not a pattern make. Moreover, the purported explanation of an L&I  
21 employee concerning the refusal to accept service that is recounted by one of plaintiffs'  
22 attorneys, see McGillivray Decl. (docket no. 40-6), is merely inadmissible hearsay, see

1 Fed. R. Evid. 802, and does not constitute the type of official statement by L&I that  
 2 would warrant a conclusion concerning L&I's usual practices.

3       Even if plaintiffs could establish that L&I has a policy of refusing service when  
 4 the claim against the surety is initiated in federal court, and even if such practice violates  
 5 the Supremacy Clause of the United States Constitution,<sup>3</sup> such conclusion would not  
 6 warrant reconsideration. In the Order entered April 2, 2014, docket no. 36, the Court  
 7 interpreted the service-of-process provision of RCW 18.27.040(3). Plaintiffs' challenge  
 8 to L&I's policy involves the venue or jurisdiction provision of RCW 18.27.040(3).

9 These two provisions are distinct, separated spatially by three other provisions, one  
 10 dealing with mandatory joinder and two setting forth the applicable limitation periods.

11 Plaintiffs cite no authority for their proposition that the Court must ignore the plain  
 12 language of one statutory provision, concerning service of process, simply because an  
 13 expressly severable<sup>4</sup> provision, ostensibly regarding venue, might be unconstitutionally  
 14 applied.

15       Moreover, as a practical matter, even if plaintiffs had standing to challenge the  
 16 alleged policy of L&I, they could not further pursue their claims against the Sureties. In

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 18       <sup>3</sup> Any Supremacy Clause concerns are easily avoided by reading the provision allowing an action against  
 19 a contractor bond "in the superior court of the county in which the work was done or of any county in  
 20 which jurisdiction of the contractor may be had," RCW 18.27.040(3), as merely specifying the venue for  
 21 the litigation, *i.e.*, the county or federal district in which to bring suit, and not as "closing the door" to  
 22 federal jurisdiction.

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 24       <sup>4</sup> See RCW 18.27.900 ("If any provision of this chapter is declared unconstitutional, or the applicability  
 25 thereof to any person or circumstances is held invalid, the constitutionality of the remainder of the chapter  
 26 and the applicability thereof to other persons and circumstances shall not be affected thereby."); see also  
 27 Shouse v. Pierce County, 559 F.2d 1142, 1147-48 (9th Cir. 1977) (recognizing that, under Washington  
 28 law, the presence of a severability clause provides the necessary legislative assurance that the remaining  
 29 provisions would have been enacted without the portion that is unconstitutional).

1 joining the state law claims against the Sureties to this action, plaintiffs have relied solely  
 2 on supplemental jurisdiction,<sup>5</sup> which may be declined. See 28 U.S.C. § 1367(c). Had  
 3 plaintiffs properly served the Sureties or been deemed to have done so, the claims against  
 4 the Sureties would still be subject to dismissal in light of the defaults of all defendants  
 5 involved in claims over which the Court has original jurisdiction. See Boyd v. Herron, 39  
 6 F. Supp. 2d 1129 (N.D. Ind. 1999) (declining to exercise supplemental jurisdiction over  
 7 state law claim against county sheriff after entry of default against other two defendants,  
 8 who were being sued under 42 U.S.C. § 1983); see also Fitzpatrick v. Winn-Dixie  
 9 Montgomery, Inc., 153 F. Supp. 2d 1303 (M.D. Ala. 2001) (after entering default against  
 10 individual defendant and granting summary judgment on federal claim in favor of  
 11 corporate defendant, declining to exercise supplemental jurisdiction over remaining state  
 12 law claims against corporate defendant).<sup>6</sup>

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<sup>5</sup> Plaintiffs do not assert diversity jurisdiction because the aggregate amount of the bonds at issue does not exceed the jurisdictional threshold, see 28 U.S.C. § 1332, and plaintiffs cannot contend that their claims against the Sureties fall within this Court's federal question jurisdiction, see 28 U.S.C. § 1331; see also Greenblatt v. Delta Plumbing & Heating Corp., 68 F.3d 561 (2d Cir. 1995) (holding that employee-benefit trust claims against sureties do not "arise" under the Employee Retirement Income Security Act of 1974 ("ERISA")); Giardiello v. Balboa Ins. Co., 837 F.2d 1566 (11th Cir. 1988) (affirming dismissal of ERISA claim against employer's surety); Haw. ex rel. Haw. Laborers' Trust Funds v. Am. Ins. Co., 1991 WL 311969 (D. Haw. July 18, 1991).

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<sup>6</sup> Giardiello v. Balboa Ins. Co., 837 F.2d 1566 (11th Cir. 1988), does not dictate a different result. In Giardiello, the Eleventh Circuit could not ascertain whether the district court had analyzed the factors articulated in United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) ("judicial economy, convenience and fairness to litigants"), before dismissing the pendent party claims against the defaulting employer's surety. Id. at 1570, 1571-72. The Giardiello Court expressed concern over whether, during the course of the federal litigation, the pendent state law claims against the surety had become barred by the statute of limitations, a situation that would weigh against dismissal. Id. at 1571. Giardiello, however, was decided before the enactment of the supplemental jurisdiction statute, which provides that the limitation period is tolled while the pendent (now known as supplemental) state law claim is pending in the federal action and for at least thirty days after it is dismissed. 28 U.S.C. § 1367(d).

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## **Conclusion**

For the foregoing reasons, plaintiffs' motion for reconsideration, docket no. 40, fails to demonstrate any manifest error in the Court's previous ruling, see Local Civil Rule 7(h)(1), and is therefore DENIED. The Clerk is DIRECTED to send a copy of this Order to all counsel of record and to the Office of the Washington State Attorney General at 1125 Washington St. SE, P.O. Box 40100, Olympia, WA 98504-0100.

Dated this 29th day of May, 2014.

Thomas S. Bally

THOMAS S. ZILLY  
United States District Judge